interest where the claims of the creditors to which it was thus subrogated were interest bearing.

That a person lending money to another who is under a disability should have some means of recovering his advances seems obvious, for otherwise incapacitated people might suffer severe deprivation though possessed of considerable resources, for want of credit to enable them to supply their immediate needs. But the remedy by subrogation, besides being fictitious and circuitous, has two marked defects. If the borrower pays cash for his necessaries, no debt arises to which the lender can be subrogated; yet surely he is just as worthy of relief. If the borrower becomes insolvent, and the lender happens to be subrogated to the rights of secured creditors, he receives a wholly undeserved priority.[12] It would seem wiser, therefore, to base the lender's right to recover on quasi-contractual principles, and argue that the borrower has been enriched and has a duty to reimburse the person to whom this enrichment is due.[13] In analogous cases, a surety on an infant's note for necessaries who has paid the debt,[14] and one who has paid a debt for necessaries at the infant's request, may recover in assumpsit.[15] If the lender's recovery is limited to money actually spent for necessaries, it can make no substantial difference to the borrower whether his liability be for money borrowed or for the price of the necessaries;[16] and the objection on which the early decisions rest, that the lender might encourage the borrower to squander his funds, ceases to apply.[17] Since, moreover, the obligation to repay is raised by the law regardless of any contractual relation,[18] the technical argument of the old cases [19] that a contract, void when made, cannot later become binding simply because the money is spent for necessaries, has no force.[20]

LIABILITY OF LESSOR RAILROAD FOR ACTS OF LESSEE. — Unlike ordinary corporations, railroads are not permitted to lease their properties to one another without express legislative assent.[1] Where a road is operated under an unauthorized lease, the lessee is regarded as the agent of the lessor, and the latter is held to strict accountability for all its

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[12] *Cf. In re* Wrexham, etc. R. Co., *supra*.

[13] See *In re* Rhodes, *supra*, *per* Cotton, L. J., 105, *per* Lindley, L. J., 107; KEENER, QUASI CONTRACTS, 19–21; WILLISTON, SALES, §§ 24, 34, 41, 48.

[14] Conn *v.* Coburn, 7 N. H. 368; Haine's Admr., *v.* Tarant, 2 Hill Law (S. C.) 400.

[15] Randall *v.* Sweet, 1 Den. (N. Y.) 460.

[16] See Kenyon *v.* Farris, *supra*, 517; Leuppie *v.* Osborn, *supra*, 640.

[17] See Darby *v.* Boucher, *supra*; Earle *v.* Peale, *supra*.

[18] See Trainer *v.* Trumbull, 141 Mass. 527, 530; *In re* Rhodes, *supra*, 105, 107. *Cf.* Sceva *v.* Treu, 53 N. H. 627; Sawyer *v.* Lufkin, 56 Me. 308.

[19] See Darby *v.* Boucher, *supra*.

[20] Even if the liability be regarded as contractual, there is no good reason why under the modern doctrine that such contracts are voidable rather than void, the contract should not cease to be voidable when the money has been expended for necessaries. See WILLISTON, SALES, § 24.

[1] Public service corporations, as a rule, may not lease, sell, or consolidate their properties without legislative consent. See NOYES, INTERCORPORATE RELATIONS, § 177.

agent's acts and omissions.[2] Even where a lease has been expressly authorized, the courts have repeatedly said that public policy will not permit a railroad to shift its responsibilities.[3] The courts have differed, however, as to how far public expediency requires them to modify the usual rules governing the relation between landlord and tenant.[4] The cases fall into three groups. A lessor is everywhere liable when some positive statutory duty has been omitted.[5] On the other hand, in probably only two jurisdictions have the courts gone so far as to allow employees of the lessee to look to the lessor for recompense for injuries occasioned by the negligence of the lessee.[6] Between these two extremes the cases are in conflict,[7] especially where an outsider has been injured by the negligence of the lessee.[8]

The Supreme Court of Pennsylvania holds that the lessor is not responsible for the lessee's negligence.[9] It is not surprising, therefore, that in a recent case in that court a lessor was not required to reimburse a shipper for the loss occasioned by the unreasonable discrimination of the lessee. *Moser* v. *Philadelphia, H. & P. R. Co.*, 82 Atl. 362. Under Pennsylvania statutes certain shippers are entitled, upon demand, to siding facilities. The plaintiff in the principal case had repeatedly but unsuccessfully applied to the lessee to have a siding installed. Because of the peculiar nature of a siding, one judge dissented on the ground that even though the lessor was not liable for the lessee's refusal to handle the plaintiff's goods, it was, nevertheless, the lessor's positive statutory duty to see that a siding was installed. The majority of the court completely answered this objection by pointing out that no demand was ever made upon the lessor.

By thus refusing to make the lessor responsible for the lessee's misconduct, as well in cases of discrimination as in cases of negligence, the court seems to have adopted the sounder view. A contrary view seems difficult to sustain on principle. That it is more advantageous to the public to have two defendants to look to instead of one, as the Georgia court has suggested,[10] is not a legal reason why a lessor should be held for the acts of one who is not in any way his agent. Other courts have chosen a precarious footing by relying on public policy, for their argument comes down to this, that where the legislature has found that

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[2] See Railroad Co. *v.* Brown, 17 Wall. (U. S.) 445, 450; VanDresser *v.* Oregon, etc. R. Co., 48 Fed. 202.

[3] See McCabe's Admx. *v.* Maysville, etc. R. Co., 112 Ky. 876, 66 S. W. 1054.

[4] See TIFFANY, LANDLORD & TENANT, § 96.

[5] See Hayes *v.* Northern Pacific R. Co., 74 Fed. 279. A lease does not exempt a lessor canal company from liability for not maintaining sufficient bridges across its canal. Ryerson *v.* Morris Canal, etc. Co., 71 N. J. L. 381, 59 Atl. 29.

[6] Chicago, etc. R. Co. *v.* Hart, 209 Ill. 414, 70 N. E. 654; Harden *v.* North Carolina R. Co., 129 N. C. 354, 40 S. E. 184. See also 62 CENT. L. J. 181; 18 HARV. L. REV. 152.

[7] A lessor has been held responsible because its lessee did not stop trains at a station to which tickets had been sold. Pickens *v.*Georgia Railroad & Banking Co., 126 Ga. 517, 55 S. E. 171.

[8] In ten states a railroad lessor is liable for the negligence of its lessee. A contrary result has been reached in eleven other jurisdictions. See NOYES, INTERCORPORATE RELATIONS, § 219; 20 HARV. L. REV. 334.

[9] Pinkerton *v.* Pennsylvania Traction Co., 193 Pa. St. 229, 44 Atl. 284.

[10] Green *v.* Coast Line R. Co., 97 Ga. 27, 24 S. E. 814.

public policy has justified it in authorizing a company to build a railroad, public expediency does not justify it in authorizing that company to lease the road to another.[11] On all ordinary legal principles, a lessee is not the agent of the lessor, but the holder of an estate in the property. The lessor is powerless to terminate the estate, or control the actions of the lessee. To hold a lessor railroad responsible is to make it something more than an involuntary surety. After the legislature has authorized a lease, is a court justified because the lessor once owned the railroad and still retains its franchise and some small future estate in the land, in making it, in substance, an insurer? [12] There is a sound distinction between responsibility for the omission of a positive statutory duty, and liability for the wrongful acts of others.[13]

PRIORITY OF ASSIGNEES UNDER SUCCESSIVE ASSIGNMENTS OF EQUITABLE INTEREST. — If the beneficiary of a trust fund assigns his interest to A. for value and A. gives no notice of the assignment to the trustee; and later the beneficiary purports to assign the same interest to B., who, having no notice of the previous assignment, gives value and notifies the trustee of the transaction, which party is entitled to the fund in the hands of the trustee? [1] The English cases give the second assignee the priority.[2] New Jersey has recently adopted the English rule.[3] *Jenkinson* v. *New York Finance Co.*, 82 Atl. 36 (N. J.).

When A. sells a chattel to B. and then later purports to sell the same chattel to an innocent purchaser, the purchaser does not get the chattel, for A. has no longer any chattel to sell. But when Dearle *v.* Hall,[4] the leading English case on successive assignments of equitable interests, was decided,[5] the rule of law in England was that if A. still had the chattel in his possession, and delivered it to the innocent second purchaser, the purchaser could keep the chattel.[6] In an earlier case,[7] moreover, much relied on in Dearle *v.* Hall, it had been decided under the

[11] Where the legislature has expressly limited the lessor's liability, even these courts are bound by the legislature's determination as to public policy. See Singleton *v.* South Western R. Co., 70 Ga. 469.

[12] "The subject has been much discussed and some of the cases are characterized by lack of discrimination between liability for duties absolutely imposed by law upon the lessor company and duties arising from the manner of the operation of the trains." Hayes *v.* Northern Pacific R. Co., *supra*, 282.

[13] Railroad Co. *v.* Curl, 28 Kan. 622.

[1] The cases seem to make no distinction on this point between an equitable interest and a chose in action.

[2] Dearle *v.* Hall, 3 Russ. 1; Meux *v.* Bell, 1 Hare 73. See AMES, CASES ON TRUSTS, 2 ed., 326, note; 1 HARV. L. REV. 10.

[3] Two previous New Jersey decisions have uniformly been cited as holding a contrary doctrine, but the court in the principal case seems quite properly to distinguish them. Executors of Luse *v.* Parke, 17 N. J. Eq. 415; Kamena *v.* Huelbig, 23 N. J. Eq. 78. See Cogan *v.* Conover Mfg. Co., 69 N. J. Eq. 358, 372, 60 Atl. 408, 414.

[4] *Supra.*

[5] In 1828.

[6] Edwards *v.* Harben, 2 T. R. 587 (1788). But *cf.* Twyne's Case, 3 Coke, 80 *b.*

[7] Ryall *v.* Rowles, 9 Bligh N. S. 377, 1 Atk. 165, 1 Ves. 348 (1750). *Contra*, Bartlett *v.* Bartlett, 3 Jur. N. S. 284 (1857).